A

BERJAYA DEVELOPMENT SDN BHD

v.

KERETAPI TANAH MELAYU BHD & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
SITI KHADIJAH JC
[SUIT NO: S-22-125-1994]
13 APRIL 2012

C ***CIVIL PROCEDURE:*** *Action - Accrual of - Termination of Lease Agreement - Claim for damages or specific performance - Whether action time barred - Limitation Act 1953, s. 6(1)(a)*

CONTRACT: *Breach - Damages/specific performance - Plaintiff entered into Lease Agreement with Malayan Railway - Unilateral termination of* D *Lease Agreement - Whether lawful - Whether plaintiff proved losses - Whether plaintiff entitled to damages*

The plaintiff, on 23 April 1982, had entered into a lease agreement for a lease period of 30 years, with an option to renew for E another 30 years ('lease agreement') with Malayan Railway Administration ('Malayan Railway'). However, the lease agreement was unilaterally terminated by Malayan Railway. Subsequently Malayan Railway was dissolved in 1991 and all of its assets and liabilities were taken over by Railway Assets Corporation ('RAC'), F the second defendant. In 1993, the land under the lease agreement was sold to a third party. Hence, the plaintiff claimed for specific performance of the agreement and/or damages. The issue for the court's determination was whether the plaintiff's action was time-barred and whether there was a breach of G contract and the plaintiff suffered damages as a result thereof.

Held (dismissing the plaintiff's claim with cost):

(1) The subject matter of the case was breach of the lease agreement which fell squarely within the ambit of s. 6(1)(a) of H the Limitation Act 1953. The cause of action, *ie*, the termination of the lease agreement, accrued on 28 December 1984 and thus the plaintiff should have commenced the suit by 1990 which was within six years after the alleged breach. Failure to do so constituted breach of limitation. (paras 4 & I 5)

(2) The lease agreement was validly and lawfully terminated and thus the court found that there was no breach of contract. The plaintiff also had failed to produce evidence to show that it had suffered damages. In the circumstances, the plaintiff was not entitled to specific performance, damages or compensation. (para 6)

Case(s) referred to:

Ambank (M) Bhd v. Abdul Aziz Hassan & Ors [2010] 7 CLJ 663 CA ***(refd)***

Berjaya Development Sdn Bhd v. Keretapi Tanah Melayu Bhd & Anor [2007] 6 CLJ 687 CA ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 101

Limitation Act 1953, s. 6(1)(a)

For the plaintiff - K Kunamoney (M Indrani with her); M/s Jamaludin Ibrahim & Assocs

For the defendant - Harikannan Ragavan; M/s Jayadeep Hari & Jamil

Reported by Baizura Abdul Razak

JUDGMENT

Siti Khadijah JC:

[1] On 23 April 1982, the plaintiff Berjaya Development Sdn. Bhd. entered into a lease agreement with Malayan Railway Administration (hereinafter referred to as Malayan Railway) for a lease period of 30 years, with option to renew for another 30 years. The lease agreement was subsequently unilaterally terminated by Malayan Railway on a 'date' which is to be determined by this court. The proposal by Malayan Railway of an alternative lease agreement on shorter duration did not materialise. Malayan Railway was dissolved on 2 September 1991 and all its assets and liabilities were thereafter taken over by Railway Assets Corporation which is the 2nd defendant in this suit. In 1993 the land under the lease agreement was sold to a third party.

[2] The plaintiff is now claiming from the 2nd defendant specific performance of the agreement and/or damages. The defendant on the other hand submits that the plaintiff's claim is barred by limitation and that they have failed to prove their claim that they suffered damages.

Court's Findings

Whether Plaintiff's Action Is Time-barred By Limitation?

[3] Page 25 of bundle B is the notice of termination of the lease agreement dated 28 December 1984 the content of which is as follows:

> Merujuk kepada surat tuan bertarikh 27hb. September, 1984, adalah dimaklumkan bahawa tujuan pajakan tapak tersebut di atas pada tuan ialah untuk pembinaan kompleks kedai dan sukan (shopping/sports complex). Memandangkan pajakan tanah rezab keretapi telah dibekukan oleh kerajaan dan disebabkan tuan tidak dapat meneruskan projek tuan, cadangan tuan untuk menggunakan tapak secara sementara bagi maksud koc restoran adalah dipersetujui oleh Pentadbiran ini atas syarat-syarat penyewaan seperti yang berikut:
>
> a) Penyewaan secara 'tenancy' selama tiga tahun mulai tarikh pendudukan.
>
> b) Sewa dikenakan sebanyak RM600.00 sebulan tidak termasuk kawasan lapang.
>
> c) Penyewaan boleh ditamatkan oleh mana-mana satu pihak pada bila-bila masa dengan pemberian satu bulan notis.
>
> d) Syarat-syarat lain adalah seperti biasa.
>
> Dengan ini pajakan tuan bawah surat perjanjian no. 327 bertarikh 23hb. April, 1982 adalah dibatalkan.

[4] In *Ambank (M) Bhd v. Abdul Aziz Hassan & Ors* [2010] 7 CLJ 663 the Court of Appeal decided that time began to run from the date of accrual of the cause of action and not from the date the plaintiff discovered its cause of action. In the current suit this court finds that, while the cause of action accrued on 28 December 1984, the plaintiff filed his claim in 1994, the subject matter of which is not the recovery of land, but the defendant's alleged breach of the Lease of Railway Reserve Agreement. In the circumstances this court is of the view that the facts fall squarely within the ambit of s. 6(1)(a) of the Limitation Act 1953 whereby the plaintiff should have commenced this suit by 1990 which is within six years after the alleged breach, or from the time the cause of action accrued. This the plaintiff failed to do, and this court is of the opinion that failure to do so constitutes a breach of limitation.

Termination Date Of The Lease Agreement

[5] In his evidence PW2, the company's auditor, had admitted under cross-examination that the lease agreement ie at pp. 62-65 of bundle B is the agreement referred to as 'Perjanjian No 237'. PW2 also admitted that the rentals from 1985 and 1986 were in fact returned to the plaintiff which is confirmed by the letter at p. 15 of bundle B dated 11 January 1986 which states that the rentals were returned because the lease was already terminated. That the lease agreement in this claim was terminated on 28 December 1984 is confirmed by the Court of Appeal in *Berjaya Development Sdn. Bhd. v. Keretapi Tanah Melayu Bhd & Anor* [2007] 6 CLJ 687. For the above reasons this court finds that 'Perjanjian 327' ie the lease agreement was terminated on 28 December 1984.

Breach Of Contract And Claim For Specific Performance, Or For Loss And Damages Or Compensation

[6] It is an agreed fact that Malayan Railway had unilaterally terminated the lease agreement and that there was no termination clause by either party. As the agreement was validly and lawfully terminated this court finds that there was no breach of contract and following that the plaintiff is not entitled to specific performance or damages or compensation. (It also needs to be mentioned here that in his claim for damages the plaintiff failed to produce evidence to show he suffered damages. It is also not in dispute that the said land has been sold).

The Burden To Prove Whether Fulfilled, And The Effect Of Not Calling Witnesses By The Defence

[7] The burden of proving a claim lies on the person alleging the claim. So it is here, the burden is on the plaintiff to prove his claim before the burden moves to the defendant. Section 101 Evidence Act 1950 refers. Here the plaintiff fails to prove his claim that there is breach of contract by the 2nd defendant. Though the 2nd defendant did not have any witnesses for the defence they did not at any stage submit on 'no case to answer'. On counterchecking the courts record (cd) it is clear that the defendant closed their case at the close of the plaintiff's case. This court is of the view that it is not only inappropriate but also

improper and unjust at this juncture for the court to assume that all evidence led by the plaintiff is correct. All available evidence, therefore, deserves full scrutiny and evaluation in arriving at a fair decision by this court.

[8] Having scrutinised and studied the evidence, the exhibits as well as counsels' submissions, and on a balance of probabilities, I find that the plaintiff has failed to prove their claim for reasons I have stated above and I also find that the defence of limitation has defeated the plaintiff's claim in this action. As such I'm dismissing plaintiff's claim, with cost to be assessed by the Deputy Registrar.